Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term, 1995

DIANN HARRIS CARTER, ET AL.,

Petitioners,

vs.

STANLEY MROZOWSKI, ET AL.,

Respondents

Petition for Writ of Certiorari to the Pennsylvania Supreme Court

---

PETITION FOR WRIT OF CERTIORARI

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50 pp

QUESTIONS PRESENTED

The imposition of heightened pleading standards by state courts to dismiss 42 U.S.C. §1983 claims that are properly and sufficiently plead under federal pleading standards denies the guaranteed federal rights remedied by 42 U.S.C. §1983.

LIST OF PARTIES

Diann Harris Carter, Joanna Foster, Joyce Waters, Gwendolyn Towles Manning, Deborah Alger, Frances Manning, Dr. Rosemary Madl, Marilyn R. Lovell, Cathy Consla, and Rodger L. Beatty,

Petitioners

Stanley Mrozowski, Ralph Moyer, Jeffrey Piccola, Gary Beese, John Thomas, Dahl Krow, Mark Barton, Larry Decker, Deborah Gantt, Patricia Bard, Wendy Minnix, Lynn Loomis, Sandy Reisinger, Kelly Dunlap, Irene Urban, Individually; Boswell, Snyder, Titner & Piccola, A Law Firm, Edgewater Psychiatric Center, Northwestern Corporation, Dauphin County Mental Health and Mental Retardation Case Management Unit and Dauphin County Mental Health and Mental Retardation Counselling, Private Corporations, and Dauphin County A Local Government,

Respondents

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DIANN HARRIS CARTER, ET AL.,

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STANLEY MROZOWSKI, ET AL.,

Respondents

Petition for Writ of Certiorari to the Pennsylvania Supreme Court

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PETITION FOR WRIT OF CERTIORARI

The petitioners, ten (10) individuals composed largely of Black women by and through their Attorney Don Bailey, respectfully request that a writ of certiorari issue to review the Order of the Pennsylvania Supreme Court for the Middle District entered November 16, 1995 which denied petitioners' Allowance of Appeal.

When suit was originally filed, the Third Circuit required heightened pleading standards for civil rights complaints. While this case was pending, this Court curtailed the Third Circuit's heightened pleading standards requirement in Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, ___ U.S. __ (1993), 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993) . The statute of limitations had run by the time Leatherman was decided, and plaintiff could not voluntarily dismiss the case and refile the action in the District Court. The time limit for removal had also passed.

Petitioners' 42 U.S.C. §1983 action was dismissed on the grounds that the complaint failed to state facts sufficient to constitute a cause of action under Pennsylvania's fact pleading standards. The complaint was clearly sufficient under the Federal Rules of Civil Procedure. It was also more than sufficient under Pennsylvania's own standards, state court opinion notwithstanding. Simply put, Pennsylvania's pleading standards were used to deny a valid 42 U.S.C. §1983 cause of action. Petitioners' were denied a federal substantive right simply because they chose to bring their civil rights action in a state forum. This denial of a federal right by a state, violates the Supremacy Clause and destroys the uniform application of 42 U.S.C. §1983 ie. federal law.

OPINIONS BELOW

On November 16, 1995, the Pennsylvania Supreme Court denied Petitioner's Allowance of Appeal from the June 2, 1995 order issued by the Commonwealth Court of Pennsylvania which upheld the lower court's May 10, 1995 decision granting a demurrer and dismissing petitioners' claim for relief under 42 U.S.C. §1983. The Common Pleas Court Memorandum and Order entered May 10, 1995 granting respondents' demurrer and dismissing petitioners' claim pursuant to Pa. R. Civ. P.1028 is attached hereto and marked Appendix C. The Commonwealth Court Memorandum and Order which upheld the lower court's decision was entered June 2, 1995 and is attached hereto and marked Appendix B. The Pennsylvania Supreme Court's denial of Allowance of Appeal entered November 16, 1995 is attached hereto and marked Appendix A.

STATEMENT OF JURISDICTION

The judgement of the Commonwealth Court of Pennsylvania (App. B) was entered June 2, 1995. The Order of the Pennsylvania Supreme Court denying an allowance of appeal was entered November 16, 1995 (App. A). The jurisdiction of this Court is based on Rule 10.1(b) of the Rules of the Supreme Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment to the United States Constitution:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Article III, Section I of the United States Constitution:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Article VI Section I of the United States Constitution:

The Supremacy Clause

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made,or which shall be made, under the Authority of the United States,

> shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATEMENT OF THE CASE

Petitioners are ten (10) individuals composed largely of Black women who were all managers at the Rosalie G. Handler Center, a now de-funct non-profit corporation providing those in need with mental health care. All were managers who performed a variety of services at the Rosalie G. Handler Center including counseling and caring for the ill.

There are twenty-one (21) respondents consisting of government officials, a group of staff workers at the Rosalie G. Handler Center who had been placed there by these same government officials, private corporations and Dauphin County, a local Pennsylvania government entity.

The petitioners were eminently qualified and were performing their duties in an exceptional manner at the Center when they suddenly found themselves being accused of crime, gross mismanagement and incompetence.

Petitioners without any investigation whatsoever were all abruptly removed from their jobs and their employer, the Rosalie G. Handler Center, was dissolved. The Center was taken over by Dauphin County and the Center's highly desirable outpatient business was given to

the private corporate respondents who desired the Center's CON (Certificate of Need).

Purported statements which alleged criminal misconduct were waved around the floor of the Pennsylvania State House of Representatives by Respondent, Jeffrey Piccola, a member of the legislature. Piccola also made public statements outside the House Chamber to reporters about the petitioners while brandishing the statements given by respondents Gautt, Bard, Minnix, Loomis, Resinger, Dunlap, and Urban. These statements were procured by and through Piccola's law firm which is also a respondent.

The petitioners were publicly ridiculed and defamed, they were forcibly removed from their jobs and their careers and credentials were adversely affected. The accusations were never investigated or pursued. Factual evidence exists to indicate the firings were on account of race and also sexual orientation in certain cases.

Petitioners brought a civil action under federal and state law in state court. Petitioners in various combinations sued in state court under federal civil rights statutes and also under state claims for defamation, wrongful discharge and under a Harrisburg, Pennsylvania ordinance prohibiting discrimination based upon sexual orientation in certain cases. Petitioners claim the accusations were false and were used by respondents as part of an unlawful scheme to dissolve the Rosalie G. Handler Center in order to give the private corporate respondents the lucrative outpatient business and so that Dauphin County could meet thresholds for receiving federal money from the United States for mental health grants.

Procedurally this case began when petitioners filed their Civil Rights Complaint with the Dauphin County Court of Common Pleas in Harrisburg, Pennsylvania. The court granted respondents' demurrer and permitted petitioners to amend their Complaint. Petitioners amended their Complaint. The Court again granted a demurrer and dismissed the Complaint with prejudice because it claimed the pleading defects could not be cured.

Petitioners appealed the dismissal to the Commonwealth Court of Pennsylvania which upheld the lower court decision. Petitioners even filed an allowance of appeal with the Pennsylvania Supreme Court and were denied.

REASONS FOR GRANTING THE WRIT

I.

THE IMPOSITION OF HEIGHTENED PLEADING STANDARDS BY STATE COURTS TO DISMISS 42 U.S.C. §1983 CLAIMS THAT ARE PROPERLY AND SUFFICIENTLY PLEAD UNDER FEDERAL PLEADING STANDARDS DENIES THE GUARANTEED FEDERAL RIGHTS REMEDIED BY 42 U.S.C. §1983.

The application of stricter pleading standards by states is outcome-determinative and violative of the Supremacy Clause. Heightened state pleading rules which act to defeat viable civil rights claims because of the choice of forum is inconsistent with the intent and purpose of 42

U.S.C. § 1983 and defeats uniformity in enforcing the federal civil rights acts and causes forum shopping.

This Court has held that states may establish the rules of procedure governing litigation in their own courts, however where state courts entertain a federally created cause of action, the "federal right cannot be defeated by the forms of local practice". Brown v. Western R. Co. of Alabama, 338 U.S. 294, 296, 70 S.Ct. 105, 106, 94 L.Ed. 100 (1949).

It is clear in Brown, that local rules of pleading can constitute unlawful substantive limitations on a federal statutory right. As Justice Holmes stated in Davis v. Wechsler, 263 U.S. 22, 44 S. Ct. 13, 68 L. Ed. 143 (1923), cited in Brown at 299,

> "Whatsoever springs the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights when plainly and reasonably made is not defeated under the name of local practice. Id.

While the Supreme Court has applied the rule of Brown to FELA (Federal Employer Liability Act) cases and other types of federal claims brought in state court, the Supreme Court has never passed on whether this rule also applies to a 42 U.S.C. §1983 action. Certiorari was granted in Brown because "the implications of the dismissal were considered important to a correct and uniform application of the federal act in the state and federal courts". Id. 338 U.S. 295. Given the broad

remedial nature of 42 U.S.C. §1983 and the proclivity for allowing liberal pleading practices in federal courts, it would be anomalous to require a different standard for 42 U.S.C. §1983 actions. The critical issue is whether state pleading standards overly burden federal rights guaranteed to U.S. citizens. Pennsylvania's rules do not merely regulate the housekeeping aspects of pleading. Instead, (or at least in this case) they required a much higher threshold of fact pleading than that required by federal law. By so doing, they have acted to bar and inhibit the bringing of 42 U.S.C. §1983 actions in state courts generally. Thus although Pennsylvania provided sufficient procedural due process, her pleading standards have denied a federal citizen's rights of access to our unified judicial system. Where these rules burden 42 U.S.C. §1983 litigation, or are not consistent with the purposes of 42 U.S.C. §1983, they must be rejected.

In Brown, a Georgia trial Court sustained a general demurrer to a complaint brought under the FELA. A Georgia rule of practice required that pleadings must be construed most strongly against the pleader. The Court held that under federal law the facts alleged in the Complaint supported the inferences of negligence and that the issue should go to the jury.

Where state rules "dig into substantive rights" or are used to "impose unnecessary burdens upon rights of recovery authorized by federal law, they will be overridden. Id 338 U.S. 296.

Brown also makes it clear that the U.S. Supreme Court is the ultimate arbiter of the sufficiency of state court pleadings in a federal statutory action. The Court concluded that it was the duty of the Supreme Court "to

construe the allegations of the complaint ourselves in order to determine whether petitioner has been denied a right to trial granted him by Congress". The issue is clear - federal rights cannot be defeated by forms of local practice. "And we cannot accept as final a state court's interpretation of allegations asserting it". Id. 338 U.S. 296.

Heightened state pleading standards which act to bar and inhibit viable 42 U.S.C. § 1983 claims should be held violative of the Supremacy Clause. In analyzing converse-Erie issues, this Court has always considered Congress' intent and whether the state rule in question is consistent with the broad remedial goals of the federal civil rights laws or does the application stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Where a state rule is inconsistent, it must be pre-empted.

This Court has consistently found that federal standards should prevail in converse-Erie 42 U.S.C. §1983 cases where federal and state rules conflict. SEE: generally Martinez v. California, 444 U.S. 277, 100 S. Ct. 553, 62 L. Ed. 2d 481 (1980). (State immunity rules cannot be applied to defeat §1983 claims), Maine v. Thibolout, 448 U.S. 1, 100 S.Ct. 2502, 65 L. Ed. 2d 555 (state attorney fee rules cannot defeat 42 U.S.C. §1988), Felder v. Casey, 487 U.S. 130,108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988) (state notice of suit rule for civil rights complaint burdens federal right to bring §1983 action). Most of this Court's decisions dealing with converse-Erie problems favor a uniform system for addressing federal rights in state courts and for parity between state and federal courts where there is concurrent jurisdiction.

This Court, in Felder held that where the application of a state rule was outcome determinative of a federal right, the state rule must be pre-empted. Heightened state pleading standards are more than simple procedural rules, the standards can completely deny a 42 U.S.C. §1983 claim brought in state court. Unless a claimant can provide sufficient facts to meet the state's pleading requirement, an otherwise viable 42 U.S.C. § 1983 claim is annihilated. Pennsylvania may not alter the outcome of federal claims by demanding compliance with its outcome-determinative rules.

Simply put, Pennsylvania is saying that her pleading standards and practices need not respect the standards and practice of federal law which guarantees a citizen's federal rights even when Pennsylvania is applying federal law.

This Court has established that in order to maintain a 42 U.S.C. §1983 action, a plaintiff must demonstrate a violation of a federally protected constitutional right and that the violation occurred by state action or under color of state law. Adickes v. S.H. Kress & Co., 398 U.S. 144, 150, 90 S.Ct. 1598, 1604, 26 L.Ed. 2d 142, 150 (1970). Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99, L. Ed. 2d 80 (1957).

Fed. R. Civ. P. 8(a) only requires a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief. Most states have adopted pleading rules patterned after the federal rules and do not subject 42 U.S.C. §1983 actions to strict pleading standards.

In order to dismiss a complaint under Fed. R. Civ.

P. 12(b)(6), the controlling standard is that an action may be dismissed for failure to state a claim only if it appears beyond doubt that the plaintiff can prove no set of facts in support of a claim for which relief could be granted. Further, pleadings are insufficient to state a claim under 42 U.S.C. §1983 if the allegations are mere conclusory statements. For purposes of Fed. R. Civ. P. 12(b)(6), the allegations of the complaint are taken as true. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

The U.S. Supreme Court recently in Leatherman v. Tarrant County, __ U.S. __ (1993), 113 S.Ct. 1160, 122 L. Ed. 2d 517 (1993) invalidated heightened pleading standards for civil rights cases in federal courts. In Leatherman the Supreme Court held that civil rights causes of action need only be pled according to Fed. R. Civ. P. 8(a) notice pleading standards. It is clear from Leatherman that the Supreme Court has no interest in applying pleading standards which unreasonably restricts a plaintiff from pursuing a 42 U.S.C. §1983 action.

When this case was originally brought, the District Court for the Middle District of Pennsylvania and the Third Circuit Court of Appeals required heightened pleading standards for civil rights actions which were more similar to Pennsylvania's current fact pleading standards. While the case was pending, Leatherman was decided which curtailed heightened pleading standards for civil rights complaints.

Even under pre-Leatherman standards, the state court improperly dismissed petitioners' 42 U.S.C. §1983 claims. This Court's holdings in Brown and in Leatherman were brought in briefs and oral arguments to

the attention of all of the Pennsylvania Courts deciding this matter. Each and every Pennsylvania court that addressed this case refused to acknowledge the holdings in Brown and Leatherman.

This is evidenced by the fact that none of the Pennsylvania courts even mentioned one word about Brown or Leatherman.

Clearly, Pennsylvania courts do not want to hear civil rights cases even though they have concurrent jurisdiction and are obligated to do so.

By the time Leatherman was decided, the statute of limitations had run and it was too late to voluntarily dismiss the claim and refile it in federal court. Petitioners were stuck with a forum which now denied their 42 U.S.C. §1983 claim simply because of the choice of forum. Any argument that the requirements are designed to sift-out "specious claims" is inconsistent with the aims of 42 U.S.C. §1983 and invalidated by Leatherman. A state requirement that predictably alters the outcome of 42 U.S.C. §1983 claims depending on where the claim is brought is inconsistent with the federal interest in intrastate uniformity.

The use of substantive state pleading standards to dismiss viable 42 U.S.C. §1983 claims that comport with Adickes and Leatherman conflicts with the remedial objectives of 42 U.S.C. §1983 and denies U.S. citizens their rights of access to state courts. The sweep of 42 U.S.C. §1983 is to be granted as broad a sweep as its language. Petitioners are forced to plead specific details in Pennsylvania far beyond those they would have to plead if in a federal court. To make matters worse, their federal claim is dismissed without the benefit of any discovery.

Civil rights cases are typically the most difficult cases to plead because there are generally no "smoking guns" and the actions taken are secretive and covert. Secondly, almost all information is in the exclusive control and possession of defendants. The same was true below. 42 U.S.C. § 1983 cases allow liberal pleading standards precisely to achieve the intended remedial purpose of the act. If, after discovery is completed, insufficient facts exist, then the action can be dismissed. Pennsylvania's fact pleading standards require such extreme specificity under the holding in this case that Pennsylvania civil rights victims will be denied the opportunity to bring §1983 actions in Pennsylvania state courts.

Therefore, because these state standards conflict with and burdens a U.S. citizen's substantive federal rights to enjoy access to state courts they are preempted by the Supremacy Clause.

The purpose underlying 42 U.S.C. § 1983 is to serve as an antidote to discriminatory state laws, to protect federal rights where state law is inadequate in cases where processes are available in theory but not in practice. These rights may not be frustrated by state substantive limitations couched in procedural language.

This is a highly political case. It involves elected officials and their supporters. It should be heard. "The central objective of the Reconstructionist Era civil rights statutes .... is to ensure that individuals whose federal constitutional rights are abridged may recover damages or secure injunctive relief". Burnett v. Grattan, 468 U.S. 42, 55, 104 S.Ct. 2924, 2932, 82 L.Ed. 2d 36 (1984). §1983 provides "a uniquely federal remedy against incursions ..... upon rights secured by the Constitution and laws of

the Nation," Mitchum v. Foster, 407 U.S. 225, 239, 92 S.Ct. 2151, 2160, 32 L.Ed. 2d 705 (1972) and is to be accorded "a sweep as broad as its language." United States v. Price, 338 U.S. 787, 801, 86 S.Ct. 1152, 1160, 16 L.Ed. 2d 267 (1966).

Congress surely did not intend to assign to state courts and state legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action. Yet this is precisely the consequences. States may no more condition the federal right to recover on their pleading standards than bar the right outright. A state rule which acts to bar 42 U.S.C. § 1983 claims brought in state courts is inconsistent with the right of access to state courts and the broad remedial purpose of the statute

A law that predictably alters the outcome of 42 U.S.C. §1983 claims depending on whether the claim is brought in state or federal court within the same state is obviously inconsistent with the federal interest in intrastate uniformity. Pennsylvania applies its state fact pleading standards to determine whether a complaint pleads a cause of action under 42 U.S.C. §1983 sufficient to survive a general demurrer. Pennsylvania's demurrer is the federal equivalent of Fed. R. Civ. P. 12(b).

The Court in Brown stated it would not "fail to protect federally created rights from dismissal because of over-exacting local requirements for meticulous pleadings. Id. 338 U.S. 299.

State courts have concurrent jurisdiction to adjudicate suits brought under the federal Civil Rights Act, 42 U.S.C. §1983. Maine v. Thiboutot, 448 U.S. 1, 3, 100 S.Ct. 2502, 65 L. Ed. 2d 555, 558. Since civil rights actions

under 42 U.S.C. §1983 are based upon federal statutory law, state courts are required to apply the substantive federal law to determine and define the cause of action. Just as federal courts are constitutionally obligated to apply state law to state claims, Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), so too the Supremacy Clause imposes on state courts a constitutional duty "to proceed in such manner that all the substantial rights of the parties under controlling federal law are protected". Garrett v. Moore-McCormack, Co., 317 U.S. 239, 245 , 63 S.Ct. 246, 251, 87 L.Ed. 239 (1942).

The converse-Erie question raised is whether the state or federal law should apply to determine whether a plaintiff has filed a complaint that adequately alleges the wrongful conduct giving rise to a cause of action or claim for relief under 42 U.S.C. §1983. 42 U.S.C. § 1983 makes no reference to state procedure and contains no express provision that requires that federal law should be applied to test the adequacy of complaints filed in state court under 42 U.S.C. §1983.

The application of federal standards to determine whether a 42 U.S.C. §1983 complaint filed in state court, should survive a general demurrer (the federal equivalent of Fed. R. Civ. P. 12(b) will encourage desirable uniformity in the adjudication of federally created rights.

Based upon Felder v. Casey and Brown v. Wester R. of Alabama, strict pleading standards which are applied to dismiss a 42 U.S.C. §1983 cause of action which was sufficiently plead under federal standards violates the intent and purpose of 42 U.S.C. §1983 and should therefore be pre-empted. To hold otherwise, would

destroy the trend towards a unified system and encourage forum shopping in Pennsylvania and discourage the use of the Pennsylvania state courts in redressing 42 U.S.C. §1983 violations.

If this case had been brought in a federal court, petitioners would only have to meet a notice pleading standard to avoid dismissal. Petitioners meet that standard, however they are put out of Court by strict state fact pleading standards. In effect, they are denied a federal cause of action, simply because they chose to bring their federal claim in a state forum.

There is a more universal issue here: U.S. citizens should not be forced to go to a federal district court to get a hearing on their civil rights claims based upon where they live. To be forced to do so is a denial of the equal and fundamental justice that American citizens are entitled to.

United States District Courts sit in large districts and often civil rights victims live great distances from the nearest federal court. These people should be able to go to their local state courts to redress violations of their civil rights. Why should the citizens of Pennsylvania be afraid to go to their courthouses to enjoy the benefits of our Constitution and its Amendments?

CONCLUSION

Pennsylvania's use of strict state pleading standards to dismiss 42 U.S.C. §1983 claims properly plead under federal standards overburdens a federal substantive right in violation of the Supremacy Clause and defeats uniformity in enforcing federal civil rights acts.

Petitioners therefore request that this Honorable Court issue a Writ of Certiorari.

Respectfully submitted,

DON BAILEY
Counsel of Record
Attorney for Petitioners

APPENDIX A - ORDER DENYING PETITION FOR ALLOWANCE OF APPEAL DENIED OF COMMONWEALTH COURT FILED ON

JUNE 2, 1995

IN THE SUPREME COURT OF PENNSYLVANIA
FOR THE MIDDLE DISTRICT

CIVIL ACTION

NO. 339 M.D. ALLOCATUR DOCKET, 1995

DIANN HARRIS CARTER, ET AL.,

Petitioner,

v.

STANLEY MROZOWSKI, ET AL.,

Respondent

ORDER

PER CURIAM:

AND NOW, this 16th day of November, 1995, the Petition for Allowance of Appeal is denied.

Mr. Justice Montemuro is sitting by designation as a senior judge as provided by Rule of Judicial Administration 701(f).

BY THE COURT:

APPENDIX B - DECISION OF COMMONWEALTH COURT OF PENNSYLVANIA FILED JUNE 2, 1995

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

CIVIL ACTION

NO. 1592 C.D. 1994

DIANN HARRIS CARTER, JOANNA FOSTER, JOYCE WATERS, GWENDOLYN TOWELS MANNING, ET AL.,

Appellants

v.

STANLEY MROZOWSKI, RALPH MOYER, JEFFREY PICOLA, GARY BEESE, JOHN THOMAS, DAHL KROW, ET AL.

OPINION NOT REPORTED

MEMORANDUM OPINION BY
SENIOR JUDGE RODGERS FILED: June 2, 1995

Appellants, ten former employees of the Rosalie G. Handler Center (Handler Center), appeal from the May 10, 1994 order of the Court of Common Pleas of Dauphin County (trial court) which granted preliminary objections in the nature of a demurrer filed by the defendants in this matter and dismissed appellants' second amended

complaint[1] with prejudice. We affirm.

Appellants filed a fifteen-count complaint against the defendants, alleging violations of their civil rights, defamation, civil conspiracy to defame, wrongful discharge and violation of a local ordinance. On September 20, 1993, the trial court granted the defendants' demurrers to the first amended complaint on the grounds that appellants failed to plead the specific facts necessary to state any cause of action.[2] The trial court's extensive opinion reviewed the complaint in detail and set forth the requirements and deficiencies as to each claim.

Appellants filed a thirteen-count second amended complaint, again asserting violations of their civil rights, civil conspiracy, defamation, wrongful discharge and, for the first time, violations of rights protected by the Pennsylvania Constitution. The second amended complaint was found to be similarly deficient by the trial court. In a twenty-five page opinion, The Honorable Todd A. Hoover illustrates appellants' failure to successfully cure the defects previously identified by the trial court in addressing the first amended complaint.

On appeal to this Court,[3] appellants argue that their

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[1]The original complaint was first amended to drop one of the named plaintiffs from the action.

[2]The opinion of the Honorable Joseph H. Kleinfelter in Carter, et al. v. Mrozowski, et al., 113 Dauph. 431 (C.P.Pa. 1993) sets forth a thorough recitation of the facts and description of the parties that we conclude are not necessary to reiterate here.

[3]Our scope of review of preliminary objections in the nature of a demurrer is limited to determining whether on the facts alleged the law states with certainty that no recovery is possible. Hawks by Hawks v. Livermore, 157 Pa. Commonwealth Ct. 243, 629 A.2d 270 (1993). We must accept

second amended complaint sufficiently pleads their causes of action and that the trial court erred in applying the pleading requirement under the Pennsylvania Rules of Civil Procedure to causes of action brought under federal law.

We first address appellants' argument that the second amended complaint meets the "notice pleading" requirements under the Federal Rules of Civil Procedure and that the trial court's application of the more strict pleading requirements of the state rules of civil procedure frustrates the intent and purpose of federal law. It is well settled that the Federal Rules of Civil Procedure only apply to federal district courts, Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826 (1989) (Kennedy, J., dissenting), and cannot be applied to practice or procedure in state courts, nor affect the rights of parties in those courts. Rader v. Baltimore & Ohio Railroad Co., 108 F.2d 980 (7th Cir. 1940), cert denied, 309 U.S. 682 91940).

Appellants contend, alternatively, that the second amended complaint satisfies the pleading requirements under the Pennsylvania Rules of Civil Procedure. Pa. R.C.P. No. 1019 requires that a complaint state the material facts on which a cause of action is based. Appellants argue that the trial court ignored the significant changes they have made in their second amended complaint, but fail to indicate any of the facts allegedly included therein to support this assertion. After careful review of the second amended complaint, we concur with the conclusions reached by the trial court, which are briefly summarized as follows.

Count I of the second amended complaint addresses alleged deprivations under 42 U.S.C. §1983. Appellants allege no facts reflecting that the actions of which they complain constituted a policy, practice or custom of the municipality, or

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as true all well pled allegations and material facts averred in the complaint as well as inferences reasonably deducible therefrom; any doubt should be resolved in favor or overruling the demurrer. Id.

demonstrating how the defendants' actions were under color of state law, or supporting the existence of a protected right under the equal protection or due process clauses of the Fourteenth Amendment. See Long v. Board of Education of the City of Philadelphia, 812 F.Supp. 525 (E.D. Pa. 1993), aff'd, 8 F.3d 811 (3d Cir. 1993).

Amended Count II addresses appellants' claims under 42 U.S.C. §1985. Here, appellants fail to set forth detailed facts regarding the manner in which the defendants conspired to interfere with the administration of justice in state court and the private enjoyment of equal protection under the laws. See Fuller v. Harding, 699 F.Supp. 64 (E.D. Pa. 1988), aff'd, 875 F.2d 310 (3d Cir. 1989).

In amended Count III, appellants aver that the defendants unlawfully agreed to defame appellants and maliciously and wrongfully deprive them of their jobs and unlawfully discriminate against them. As a rule, conspiracy must be pleaded with specificity. See Hammond v. Creative Financial Planning Organization, Inc., 800 F.Supp. 1244 (E.D. Pa. 1992). The second amended complaint contains no averments as to who agreed with whom, when the agreement became apparent, or even the specific unlawful actions allegedly taken. See Smith v. Wagner, 403 Pa. Superior Ct. 316, 588 A.2d 1308 (1991).

The next eight counts of the second amended complaint address appellants' defamation claim. Despite clear direction from the trial court in the September 20, 1993 opinion, appellants again fail to identify the words or subjects of the allegedly defamatory statements, when and where broadcasts occurred or newspaper statements appeared, or to allege facts regarding the recipients' understanding of the communications. See Moses v. McWilliams, 379 Pa. Superior Ct. 150, 549 A.2d 950 (1988), petitions for allowance of appeal denied, 521 Pa. 630, 558 A.2d 532 and 521 Pa. 631, 558 A.2d 532 (1989). In addition, appellants have not provided copies of statements allegedly printed in the newspaper as required

by Pa. R.C.P. No. 1019 (h).

With respect to appellants' claim for wrongful discharge, contained in Count XII of the second amended complaint, appellants failed to rectify the absence of factual averments that appellants had employment they wished to keep and that they were terminated by their employer in violation of a contract or settled public policy. See Veno v. Meredith, 357 Pa. Superior Ct. 85, 515 A.2d 571 91986), petition for allowance of appeal denied, 532 Pa. 665, 616 A.2d 985 91992).

In Count XIII of the second amended complaint, appellants assert a separate cause of action for the violation of rights protected under Article I of the Pennsylvania Constitution. Here, appellants allege no specific facts to demonstrate that appellants were penalized for the exercise of a constitutionally protected freedom or that they lost their jobs because they were of a particular sex, see Fischer v. Department of Public Welfare, 509 Pa. 293, 502 A.2d 114 (1985), nor do they cite law identifying homosexuals as a suspect class or a protected class under the state's equal rights amendment. See Doe v. Sparks, 733 F. Supp. 227 (W.D. Pa. 1990).

The trial court also granted demurrers which challenged whether a cause of action has been stated against particular named defendants and concluded that appellants have failed to state a cause of action under each of their thirteen counts. The trial court further concluded that appellants' inability to incorporate the court's earlier directives in amending their complaint does not bode well for any future efforts. We agree with the trial court's conclusion that it clearly appears that an additional attempt by appellants to cure the defects in their complaint would be futile. See Framlau Corp. v. County of Delaware, 223 Pa. Superior Ct. 272, 299 A.2d 335 (1972). Where, as here, it appears that adjective complaint cannot be cured by amendment, preliminary objections in the nature of a demurrer may be sustained and the complaint dismissed

without further leave to amend. Philmar Mid-Atlantic v. York Street Associates, 389 Pa. Superior Ct. 297, 566 A.2d 1253 (1989).

Accordingly, the trial court's order granting the defendants' preliminary objections in the nature of a demurrer and dismissing appellants' complaint with prejudice is affirmed.

APPENDIX C - COURT OF COMMON PLEAS OPINION AND ORDER FILED MAY 10, 1994

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

CIVIL ACTION

NO. 1592 C.D. 1994

DIANN HARRIS CARTER, JOANNA FOSTER, JOYCE WATERS, GWENDOLYN TOWELS MANNING, ET AL.,

Appellants

v.

STANLEY MROZOWSKI, RALPH MOYER, JEFFREY PICOLA, GARY BEESE, JOHN THOMAS, DAHL KROW, ET AL.

ORDER

NOW, June 2, 1995, the order of the Court of Common Pleas of Dauphin County, at No. 92-S-2271, dated May 10, 1994, is affirmed.

BY THE COURT:

s /

Samuel L. Rodgers

SAMUEL L. RODGERS, J.

BEFORE TURGEON, KLEINFELTER, and HOOVER, JJ.

OPINION

This matter comes before the court on defendants' preliminary objections to plaintiffs' Second Amended Complaint. The action arises form Dauphin County's decision not to renew its contract with the Rosalie G. Handler Center, a mental health and mental retardation provider.

The Second Amended Complaint was brought in response to an Opinion and Order [hereinafter "Opinion"] of September 20, 1993, of the Honorable Joseph H. Kleinfelter.[1] That Opinion addressed defendants' preliminary objections to the first Amended Complaint. The court granted demurrers to all counts with leave to amend all but those alleging violations of 3 U.S.C. section 1981.

We must now consider whether the Second Amended Complaint succeeds in complying with the requirements set forth in the Opinion of September 20, 1993 so as to state causes of action sufficient to survive defendants' demurrers. Upon consideration of the September 20, 1993 Opinion and the Second Amended Complaint, it is the opinion of this court that plaintiffs have failed to state causes of action under any of their thirteen counts. Defendants' demurrers are granted and the Second Amended Complaint is dismissed with prejudice.

We refer to Judge Kleinfelter's earlier Opinion for a thorough recitation of the facts and description of the parties.

Plaintiffs' Second Amended Complaint consists of thirteen counts. In considering whether the Second Amended Complaint successfully cures the defects previously identified by this court in the first Amended Complaint, we address the following issues raised by plaintiffs: (1) whether plaintiffs state a cause of action for deprivation of their civil rights pursuant to 42 U.S.C. section 1983 or 42 U.S.C. section 1985 (Counts I and II); (2) whether a cause of action for civil conspiracy has been stated (Count III); (3) whether the

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[1]Carter, et al. v. Mrozowski, et al., 431 Dauph. 431 (1993).

complaint states a cause of action for defamation (Counts IV through XI); (4) whether a cause of action for wrongful discharge has been set forth (Count XII); and (5) whether the complaint states a cause of action for violation of rights protected by the Pennsylvania Constitution (Count XIII). As a final matter, we address additional demurrers which challenge whether a cause of action has been stated against particular named defendants.

Beginning with the standard for a demurrer, we:

> The standards for sustaining preliminary objections in the nature of a demurrer are quite strict. A demurrer admits every well-pleaded material fact set forth in the pleadings to which it is addressed as well as all inferences reasonably deducible therefrom, but no conclusions of law. . . . In order to sustain the demurrer, it is essential that plaintiff's complaint indicate on its face that his claim cannot be sustained, and the law will not permit recovery. . . . If there is any doubt, this should be resolved in favor of overruling the demurrer.[2]

We turn, the, to a consideration of plaintiffs' allegations of fact,setting aside as we must the numerous conclusory statements, unsupported inferences, expressions of opinion, and argumentative averments included in the complaint.

We first address the claim under 42 U.S.C. section 1983. This court previously set forth the text of the statute as well as the requirements for stating a cause of action thereunder. We refer to the Opinion for these purposes.

Count I addresses alleged deprivations under 42 U.S.C. section 1983. The essence of this allegation is that the

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[2]Gekas v. Shapp, 469 Pa. 1, 364 A. 2d 691, 693 (1976).

defendants, in their various capacities as agents of the state, through their unlawful actions in dissolving Handler Center, deprived plaintiffs of their constitutionally protected rights to due process and equal protection of the law. To state a claim under section 1983 against a municipality, plaintiffs are required to plead that the actions of which they complain constituted a policy, practice, or custom of the municipality or the actions of defendants were "under color of state law," and that there exists an entitlement to federal protection under the equal protection or due process clauses of the Fourteenth Amendment.[3]

Absent a showing of the close nexus between the state and the challenged action, the state will beheld responsible for a private decision only when it has exercised coercive power or has provided significant encouragement, covert or overt, so as to conclude the action was the directive of the state. Mere approval or acquiescence in the initiatives of a private party is not sufficient to justify holding the state responsible for those initiatives under the terms of the Fourteenth Amendment.[4] It is crucial that the facts describe conduct of defendants that is proscribed by federal law.

In applying this analysis to plaintiffs' first claim for relief under section 1983, Judge Kleinfelter found a failure to allege a policy, custom, or practice violative of any civil right or that an official with final authority to act on behalf of any of the defendants enacted such a policy.[5] Finding that plaintiffs failed to meet the threshold requirement, the

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[3]Opinion at 434; Parratt v. Taylor, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981); Long v. Board of Education of the City of Philadelphia, 812 F. Supp. 525 (E.D. Pa. 1993); White v. Moses Taylor Hospital, 763 F. Supp. 776, 786 (1991).

[4]White, 763 F. Supp. at 788.

[5]Opinion at 435.

Opinion further cautions plaintiffs that there are insufficient allegations to establish an act "under color of state law" or the existence of a protected right.[6]

Turning to paragraphs 99 through 103 which purport to set forth an amended cause of action for section 1983 violations, we find that the changes found in paragraphs 100, 102, and 103 do not represent additional facts supportive of the claim. Rather, the complaint states legal conclusions by way of adding the words "state power" and "under color of state law" provided by the court in its Opinion without the facts to demonstrate how the defendants were operating in this capacity.

We find plaintiffs have failed to articulate a claim for which relief can be granted under section 1983 through an absence of facts setting forth a policy, practice, or custom of the state, or allegations as to how any of the actions of any of the defendants were under color of state law and directly led to the deprivation of federally protected rights. We conclude that there could be no recovery under section 1983, even accepting as true every well-pleaded,material fact set forth by plaintiffs.

With respect to the claim for relief under 42 U.S.C. section 1985, this court previously found that the Complaint failed to set forth a "detailed factual pleading" with respect to the manner in which defendants conspired to interfere with the administration of justice in state court and the private enjoyment of equal protection under the laws.[7] Again, we refer to the Opinion for the text of the statute and interpretive case law.

The amended Cont II leads us to conclude in the first instance that the only change made to the original section

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[6]Opinion at 435.

[7]Opinion at 436, citing Fuller v. Harding, 699 Supp. 64 (E.D. Pa. 1988), affirmed 875 F. 2d 310 (3rd Cir. 1989).

1985 claim is to paragraph 106.[8] Secondly, a "detailed factual pleading" is clearly lacking, giving way to "broad and conclusory allegations" deemed insufficient to support a section 1985 claim.[9] The complaint does not set forth a sustainable section 1985 claim failing as it does to aver with specificity a conspiracy among defendants for the purpose of depriving a clearly defined class of persons equal protection of the laws.

Our next inquiry is the sufficiency of plaintiffs' allegations of civil conspiracy. A cause of action for civil conspiracy requires 1) the combination of two or more persons acting with a common purpose to do an unlawful act or a lawful act by unlawful means or for an unlawful purpose; 2) an overt act done in pursuance of a common purpose; and 3) actual legal damage.[10]

Count III avers that defendants unlawfully agreed to defame plaintiffs and maliciously and wrongfully deprive them of their jobs, and unlawfully discriminate against them. Nowhere in this two-paragraph claim are the facts to support these unmistakable conclusions of law. While it is not necessary to aver specifically the time, place, date of conspiratorial meeting, or the precise date on which the conspiracy was entered, facts must be alleged to at least support the inference of the combination and its intent.[11]

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[8]Plaintiffs add the words "by creating a false set of facts for a court hearing, caused injury to plaintiffs' careers, and replace them at their jobs' to the original complaint.

[9]Fuller, supra.

[10]Smith v. Wagner, 403 Pa. Super. 316, 588 A. 2d 1308, 1311-12(1991).

[11]Smith, 588 A. 2d at 1312. See also, Ersek v. Township of Springfield, Delaware County, 822 F. Supp. 218 (E.D. Pa. 1993).

We are still without averments as to who agreed with whom, when the agreement first became apparent, and the specific unlawful actions taken. we repeat what was previously cited: "As a rule, conspiracy must be pleaded with specificity."[12] This count, identical to paragraphs 111 and 112 of the first Amended Complaint, presents no facts to support the claim.

The next nine counts of the Second Amended Complaint attempt to set forth a cause of action for defamation. Once again, to state a cause of action for defamation the complaint must, on its face, allege 1) the defamatory character of the communication; 2) its publication by the defendant; 3) the communications' reference to the plaintiff; 4) the recipient's understanding of the defamatory character of the communication and its application to the plaintiff; and 5) injury resulting from the publication.[13] On its face, the complaint must identify specifically what allegedly defamatory statements were made, and to whom they were made.[14] We are again presented with vague inferences of allegedly objectionable communications.

The defamation counts in the first Amended Complaint were dismissed by this court because they failed "to identify the words or subjects of the alleged defamatory statements, the persons to whom these statements were published, the manner in which the communications refer to the plaintiffs, and the third party's understanding of the communications' defamatory

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[12]Realco Services, Inc. v. Holt, 479 F. Supp. 880, 884 (E.D. Pa. 1979).

[13]Smith, 588 A.2d at 1311.

[14]Moses v. McWilliams, 379 Pa. Super. 150, 549 A. 2d 950 (1988), appeal denied, 521 Pa. 631, 558 A. 2d 532 (1989).

character."[15] Plaintiffs still do not indicate the precise statement(s) made, nor do they attach copies of the statements allegedly printed in the newspaper in compliance with Pennsylvania Rules of Civil Procedure No. 1019(h). While paragraph 111 adds a sentence indicating to whom these allegedly defamatory statements were published, the Complaint is still devoid of specific allegations as to the recipients' understanding of the defamatory character of the communications.

We are also not satisfied that the manner of publication has been pled with sufficient specificity. Paragraph 117 refers to "certain written and verbal statements" and contains that averment that they "were disseminated publicly on radio and television and in newspapers." Missing are critical facts as to when and where the broadcasts occurred and the newspaper statements appears.[16] Failure to specifically identify the allegedly defamatory statements results in the dismissal of the complaint for lack of publication.[17]

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[15]Opinion at 438.

[16]In Smith v. Wagner, supra, plaintiffs claimed damages from the publication of defamatory statements in a local newspaper. While the averments of the complaint were not specific in that matter and the court commented that plaintiff's "style of pleading" was "not to be encouraged," Smith, 588 A. 2d at 1310, the court was able to examine copies of the newspaper attached to the complaint and "find concealed therein a legally cognizable cause of action." Smith, 588 A. 2d at 1310. In this instance plaintiffs, coincidentally represented by an attorney who represented the Smith plaintiffs, have not only replicated the Smith manner of pleading, but failed to provide the court and defense with any tangible factual basis for the publication of objectionable statements.

[17]Moses, 549 A. 2d at 960.

Turning to the wrongful discharge claim contained in Count XII of the Second Amended Complaint, we find plaintiffs have pled no additional facts i consideration of the court's previous Opinion. At that time the Court noted an absence of allegations specifying what wrongful actions were taken by the defendants, whether plaintiffs were notified by defendants of their termination, and whether any plaintiff returned to work and was refused employment. These averments are still absent. in effect, the complaint has changed little, save the addition of conclusions of law. Based upon the absence of factual allegations directed toward curing the deficiencies identified by this court, we determine that plaintiffs cannot proceed with their cause of action for wrongful discharge.

Count XIII of the Second Amended Complaint offers, for the first time in the history of these proceedings, a separate cause of action for the violation of rights protected under Article I, Sections 1, 26, and 28 of the Pennsylvania Constitution. Plaintiffs have not offered this court any case law supporting its position related to a state constitutional claim. In fact, they simply do not address the cause of action. Defendants argue that the complaint extends its pattern of averring legal conclusions to the exclusion of factual assertions.

While, at least in theory, plaintiffs could proceed with a state constitutional claim, our courts have ruled that there are specific standards to meet. The recent focus on a "New Federalism" recognizes the importance of state constitutions with respect to individual rights.[18] These claims do not simply piggyback with other federal constitutional or civil rights claims. Complainants are directed to make a plain statement of adequate and independent state grounds upon

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[18]Commonwealth v. Edmunds, 526 Pa. 374, 586 A. 2d 887, 889 (1991).

which they rely.[19] Plaintiffs, to the contrary, merely reiterate by reference their previous assertions of wrongdoing on the part of the defendants. They have made no effort to allege specific facts to present a cause of action on any state constitutional ground.

Article I, section 1 provides:

> All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

The protections of this section are broad and sweeping, representing the very foundation of our constitution. This does not, however, invite a complainant to set forth allegations claiming a deprivation of these rights which are equally broad and sweeping.

Our appellate courts have established that there is a right to earn a livelihood,[20] and a right to protect one's reputation[21] guaranteed by Article I, Section 1 of the Pennsylvania constitution. They have also held that an equal protection analysis in this area would be guided by the standards and analysis of the United States Supreme Court. Equal protection requires uniform treatment to similarly

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[19]Edmunds, 586 A. 2d at 895, citing Michigan v. Long, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983).

[20]Yaindl v. Ingersoll-Rand Company, 281 Pa. Super. 560 422 A. 2d 611, 623 (1980).

[21]Moyer v. Phillips, 462 Pa. 395, 341 A. 2d 441 (1975).

situated parties. If there are differences in treatment, the policy resulting in the distinctions must be reasonably justified. The level of scrutiny depends upon the type of classification being made, the government interest at stake, and the relationship between the two.[22]

The first step in an equal protection analysis is to identify the type of interest at stake.[23] While some plaintiffs are arguably of a suspect class, others may not be. Plaintiffs have failed to aver facts which specifically identify their fundamental rights at stake, the presence of state action operating through the defendants, and how that state action specifically resulted in wrongful disparate treatment of similarly situated persons.

Article I, Section 26 of the Pennsylvania Constitution provides:

> Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.

In analyzing a claim under Article I, section 26, the Pennsylvania Supreme Court has adopted a "penalty" analysis. The focus for scrutinizing the claim is on whether the claimant has been penalized for the exercise of a constitutional freedom.[24] As the courts have gone on to explain, this

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[22]Dansby v. Thomas Jefferson University Hospital, 424 Pa. Super. 549, 623 A. 2d 816, 820 (1993).

[23]Love v. Borough of Stroudsburg, 528 Pa. 320, 597 A. 2d 1137, 1139 (1991).

[24]Fischer v. Pennsylvania, Department of Public Welfare, 509 Pa. 293, 502 A. 2d 114, 124 (1985).

section was designed to protect citizens of Pennsylvania from being harassed or punished by the state for the exercise of constitutional rights. Where a plaintiff failed to aver that he was in any way penalized for the exercise of a constitutional right, the court held there was a failure to state a cause of action.[25]

An examination of Count XIII of the Second Amended Complaint reveals that while there are broad assertions of the deprivation of constitutionally protected rights, plaintiffs have failed to allege with any specificity in what manner they were penalized for the exercise of any particular constitutionally protected freedom. The cause of action in this regard thus fails.

Article I, Section 28 of the Pennsylvania Constitution, commonly known as Pennsylvania's Equal Rights Amendment, provides:

> Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual.

Pursuant to this provision, sex is no longer a factor in determining the legal rights and responsibilities of the citizens of the Commonwealth. The law can no longer impose different benefits and burdens based upon whether the individual is a man or a woman,[26] nor is sex accepted as an exclusive classifying tool.[27]

While plaintiffs again make broad allegations as to

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[25]Bronson v. Lechward, 155 Pa. Cmwlth. 206, 624 A. 2d 799, 801 (1993).

[26]Fischer, 502 A. 2d at 124.

[27]Commonwealth v. Butler, 458 Pa. 289, 328 A. 2d 851, 855 (1974).

defendants' sexually discriminatory actions, they do not allege facts to substantiate the claim. The complaint does not state facts to demonstrate that plaintiffs lost their jobs because they were of a particular sex. In fact, the complaint would indicate that both men and women were dismissed.

Plaintiffs further complain that some of the plaintiffs were dismissed because of their sexual orientation. Paragraphs 9, 11, and 13 describe "lesbian" plaintiffs, and paragraph 143 refers to "a white gay male," all allegedly injured by discriminatory conduct. Plaintiffs fail to demonstrate, however, that homosexual plaintiffs were dismissed while similarly situated heterosexual employees retained their jobs. Further, this court can find no legal precedent in Pennsylvania for identifying a homosexual as a member of a suspect class.[28] Nor has homosexuality been established as a protected class under the Pennsylvania Equal Rights Amendment.

As a final matter, we address several additional demurrers which challenge whether a cause of action has been stated against particular named defendants. Northwestern Corporation (hereinafter "Northwestern") demurs on the ground that the Second Amended Complaint fails to allege any involvement of this defendant in any alleged wrongdoing. Paragraph 32 identifies Northwestern as a Pennsylvania corporation that is "engaged in various for profit and not for profit activities." Additional allegations naming Northwestern are in the context of the corporation as recipient of business referred to them by Handler Center as the result of defendants' actions.[29] Northwestern is also alleged to have encouraged Edgewater Psychiatric Center to pursue a contract to operate the partial hospitalization program then run by Handler Center. According to the Complaint, Northwestern

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[28]See, Doe v. Sparks, 733 F. Supp. 227 (W.D. Pa. 1990).

[29]Second Amended Complaint, paragraphs 46, 47.

subsequently Northwestern in taking control of Handler Center's Certificate of Need.[30]

Defendants respond that the Second Amended Complaint fails to state how Northwestern was involved in causing the plaintiffs' terminations, in defaming the plaintiffs, or in causing any harm to plaintiffs. In the absence of facts establishing an abridgement of plaintiffs' rights directly caused by this defendant's actions, we are constrained to agree with defendants. This demurrer is granted.

Edgewater Psychiatric Center (Hereinafter "Edgewater") demurs for the same reasons. Edgewater is identified as a Pennsylvania corporation involved in the treatment of psychiatric disorders.[31] It is averred that Edgewater also had business referred to it as the result of defendants' actions[32] and it was somehow involved in the termination of Handler Center and some employees. It appears from the Complaint that this represents the extent of Edgewater's involvement. We agree that there are no specific allegations that this defendant was in any way a party to any alleged wrongful discharge or defamation of plaintiffs, or in any other way caused any harm to plaintiffs. the demurrer as to Edgewater is granted.

We similarly grant a demurrer by Dauphin County Mental Health/Mental Retardation Casemanagement Unit, (hereinafter "DCMHC"), a private mental health care provider, alleged to have treated clients of Handler Center following its closure. The Complaint implies that this defendant was also part of an alleged conspiracy to harm plaintiffs. Without specific facts establishing unlawful acts of DCMHC, there exists no cause of action against this party.

Defendants also demur on the grounds that the

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[30]Second Amended Complaint, paragraphs 69 - 76.

[31]Second Amended Complaint, paragraph 31.

[32]Second Amended Complaint, paragraph 46, 47.

Complaint fails to state a cause of action against Dauphin County. As we have stated above, we agree that the Complaint does not set forth sufficient allegations of fact for us to conclude that the county, as a government entity, participated in or authorized a pattern or practice of discriminatory conduct which enabled and encouraged other named defendants to deprive plaintiffs of protected rights. For this reason, as well as the failure of the other causes of action discussed above, the demurrer by Dauphin County is granted.

Defendants Gary Beese and Larry Decker, employees of Pennsylvania's Department of Public Welfare, also filed demurrers to the Complaint. We agree with defendants that there is a strong argument to be made for the operation of sovereign immunity. We do not, however, address that question here, but sustain the demurrers on the following grounds.

The plaintiffs have failed to present this court with well-pleaded facts setting forth the conduct of Beese or Decker that is proscribed by sections 1983 and 1985 or the Pennsylvania Constitution. Similarly, there are insufficient allegations to establish a cause of action against Beese and Decker for civil conspiracy, defamation, and wrongful discharge. Absent allegations that Beese and/or Decker participated in an unlawful combination, made or published defamatory statements, wrongfully discharged plaintiffs, wrongfully closed Handler Center, benefitted from its closing, or are linked in any other way to the results of the alleged unlawful conspiracy motivated by a class-based animus, the causes of action against these two defendants fail and their demurrers to Counts I, II, III, IV, and XIII are granted.

Finally, we address the preliminary objection in the nature of a demurrer of defendant Boswell, Snyder, Titner & Piccola, a law firm, which plaintiffs aver was employed at all

relevant times as the solicitor for Dauphin County.[33] Plaintiffs' theory of liability seems to be based on the fact that on January 10, 1990 William D. Boswell, Esquire, a member of the firm, became the solicitor of Dauphin County. This reasoning is fundamentally faulty, because by statute an attorney, not a law firm, must be appointed as solicitor.[34] Thus, the entire firm cannot be construed as the solicitor as plaintiffs would argue.

There are additional allegations that Jeffrey Piccola, Esquire, a member of the firm and also a member of the Pennsylvania House of Representatives, unlawfully defamed plaintiffs on the floor of the House of Representatives. Paragraph 53 avers that Piccola obtained the false information from his law firm "which serves as solicitor for Dauphin County."

We hold that the law firm was not the solicitor and therefore cannot be held liable in that capacity for any alleged mistreatment of plaintiffs. We further find that the law firm is not liable on the grounds of Piccola's alleged defamatory conduct insofar as the Complaint fails to adequately state facts to establish a cause of action for defamation as set forth above. The demurrers by the defendant law firm are accordingly granted.

Conclusion

Plaintiffs have failed to state a cause of action under each of their thirteen counts. Although this is the first time plaintiffs have asserted a claim pursuant to the Pennsylvania

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[33]Second Amended Complaint, paragraph 30.

[34]16 Pa. C.S. section 901 provides: "The county commissioners shall appoint a county solicitor, who shall be an attorney-at-law admitted to practice in the courts of this Commonwealth. . ."

Constitution and we have previously noted the court's "positive duty" to give the plaintiff opportunity to amend,[35] we find that under the present circumstances such an opportunity is properly denied.

There is ample precedent for granting leave to amend where there is a good chance the complaint could be amended successfully.[36] It was for this reason that this court previously granted plaintiffs leave to amend with specific direction as to the areas where the court identified deficiencies in fact pleading.

We turn to the case of Framlau Corp. v. County of Delaware,[37] wherein plaintiffs had already exercised two opportunities to amend. Where the court found the allegations in the amended complaint were the same as those in the original complaint, it was the court's "opinion that a third or fourth attempt would be as futile as the first two."[38] This court shares this sense of futility. Plaintiffs' inability to incorporate this court's directions in amending its complaint does not bode well for any future efforts. This holds true even for the claims asserted under the Pennsylvania Constitution which mirror the lack of factual allegations to support their broad conclusions of law which prevail throughout the rest of the complaint, despite judicial directives to the contrary.

For all of the foregoing reasons, we enter the following Order.

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[35]Opinion at 440-1.

[36]Pennfield v. Meadow Valley Electric, 413 Pa. Super. 187, 604 A. 2d 1082, 1089 (1992).

[37]Framlau Corporation v. County of Delaware, 223 Pa. Super. 272, 299 A. 2d 335, 338 (1972).

[38]Framlau, 299 A. 2d at 337-8.

ORDER

AND NOW, this 10th day of May, 1994, defendants' preliminary objections in the nature of demurrers are GRANTED and the Complaint is dismissed with prejudice.

BY THE COURT:

Todd A. Hoover, Judge